

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

**SMART SHEET METAL WORKERS
LOCAL UNION 9 (US Engineering),
Respondent,**

Case No. 27-CB-256117

and

**SALAHUDDIN BUKHARI HALL,
Charging Party**

**Hearing Held on July 30, 2019
before Administrative Law Judge
Eleanor Laws**

**RESPONDENT SMART SHEET METAL WORKERS LOCAL UNION 9's
POST-HEARING BRIEF**

I. SUMMARY OF THE CASE

SMART Sheet Metal Workers Local Union 9 (“Local 9” or “the Union”) fairly represented Salahuddin Bukhari Hall (“Hall” or “the Charging Party”) in connection with his September 2019 termination from US Engineering for refusing to take a drug test and threatening a co-worker with physical harm. Although no grievance was formally requested, the Union promptly and effectively investigated Hall’s claims of discrimination and wrongful discharge within hours of receiving notice. Jon Alvino (“Alvino”), Business Representative of Local 9, and Dwayne Stephens (“Stephens”), Business Manager, interviewed US Engineering staff, supervisors and Hall’s co-workers on various jobsites in addition to reviewing the relevant CBA and drug testing rules. Upon consideration of the evidence, Local 9 concluded that no grievance was warranted. Stephens informed Hall of the Union’s determination.

At no time did Alvino tell Hall that he could prevent Hall from working in the State of Colorado. Rather, Alvino accurately informed Hall that the internal Union charges pending against him could result in Hall’s expulsion from Local 9 membership.

II. ISSUES

- (1) Whether Local 9 satisfied its duty of fair representation to Salahuddin Hall in connection with his September 2019 discharge from US Engineering; and
- (2) Whether Local 9, through Business Representative Jon Alvino, threatened Hall in November 2019 by telling him that he could prevent him from working in the State of Colorado.

III. WITNESSES

For the Union/Respondent:

Tony Italiano, US Engineering Field Operations Coordinator
Vicky Shields, US Engineering Rocky Mountain Region Safety Director
Jon Alvino, SMART Local 9 Business Representative
Dwayne Stephens, SMART Local 9 Business Manager

For Salahuddin Hall/Charging Party:

Salahuddin Bukhari Hall, Charging Party
Joshua Blackburn, Former Co-worker
Roman Naujoks, Former Co-worker
Jama'hl Hardaway, Former Co-worker

Subpoenaed Witnesses:

Jason Anderson, Murphy Company Superintendent
Luis Villareal, Former Co-Worker

IV. RELEVANT STATUTES

NATIONAL LABOR RELATIONS ACT

29 U.S.C. § 157

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to

the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158

(b) Unfair labor practices by labor organization.

It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein

V. STATEMENT OF FACTS

A. Hall's Work History at US Engineering

Salahuddin Hall was employed by signatory employer US Engineering from June 20, 2019 until he received a Reduction in Force layoff on July 31, 2019. (Transcript at 20:15-24; 194:16-195:6). The same day Hall was laid off, Representative Alvino was present on the jobsite and met with Hall. (Tr. at 195:3-12). Although Alvino and Hall walked together off the jobsite, there was no mention by Hall of any discriminatory behavior by US Engineering or any particular individual. (Tr. 224:20-225:6). Hall only complained to Alvino regarding US Engineering Foreman John Perez (“Perez”) – another Local 9 member. (Tr. at 195:3-12; 224:20-225:6). Hall was displeased with Foreman Perez and how Perez spoke with him. (*Id.*). Hall registered his frustration by telling Alvino that he would “throw that motherfucker [Perez] out a window.” (Tr. at 195:9-12; 140:8-21) (“Q: So you’re justified in threatening to throw someone out of a 16-story window if he throws something at you? Hall: After he was -- yes.”).

Shortly after the conversation with Hall on July 31st, Alvino placed a call to Jim Marye at Trautman & Shreve, another Local 9-signatory employer, requesting and securing a new job for Hall. (Tr. at 195:19-24; 27:8-14). Hall worked for Trautman & Shreve “for a few weeks”

until he was laid off again. (Tr. at 27:15-28:3). In late August or early September of 2019, Alvino began work again at US Engineering. (Tr. at 29:2-4).

B. Hall's Threats of Physical Violence & Refusal to Submit to Drug Test

During the “morning huddle” on September 26, 2019 at Hall’s jobsite, US Engineering personnel were informed by their general contractor that “there had been the scent of marijuana coming on the jobsite recently over the last few days.” (Tr. 166:17-20). The general contractor told “the supervision of the jobsite to be on the lookout for that [marijuana].” (*Id.*). After the huddle, a US Engineering Foreman by the name Jovani Gaeta (“Gaeta”) was heading up to the 9th floor to issue a permit. (Respondent Exhibit¹ 1, Statement of Jovani Gaeta dated September 30, 2019; Tr. at 166:20-22). When Gaeta passed by Hall and another Sheet Metal worker, Joshua Blackburn, Gaeta “was hit with a strong odor of marijuana smell coming from the two individuals [Hall and Blackburn].” (*Id.*; *see also* Tr. at 168:13-15). Gaeta continued past Hall and Blackburn without contact and proceeded to call US Engineering’s Safety Directors requesting advice on how to proceed. (*Id.*). Gaeta was then instructed to seek the assistance of another foreman and politely inform Hall and Blackburn of the marijuana smell and that both workers would need to take a drug screen for probable cause. (*Id.*; Tr. at 166:21-167:3). When Gaeta and Foreman Tom Marquardt went to meet with Hall and Blackburn, both men smelled the odor of marijuana coming from both Hall and Blackburn, triggering a probable cause drug test in compliance with the Alcohol & Substance Abuse Policy in the CBA. (*Id.*; Tr. at 167:1-169:3; RX 4, Jon Alvino Investigation Notes at 4; JX 3, Colorado Sheet Metal Industry Alcohol & Substance Abuse Policy at 3-4).

Upon receiving the order to take a drug test, both Hall and Blackburn had strong negative

¹ Citations in this brief shall appear as follows: Joint Exhibits as “JX X”; Respondent Exhibits as “RX X”; and General Counsel Exhibits as “GCX X”.

reactions. (*Id.*; RX 4 at 4). Blackburn proceeded to “flip [Gaeta] off”, stated that “he did not have to take a drug screen”, and then “jumped on an elevator and disappeared.” (*Id.*). Hall remained on the 9th floor loudly decrying US Engineering as “racist” and claiming that “[the Company] is out to get him” and “he was going to sue and call his lawyer.” (*Id.*). Hall was then escorted down to the main level of the jobsite and entered Gaeta’s company vehicle to be transported to the drug testing facility. (*Id.*). After Hall was in the vehicle, Gaeta saw Blackburn and advised him that he [Blackburn] needed to take a drug screening or leave the jobsite. (*Id.*). Blackburn responded to Gaeta that “he did not have to take a drug screen unless he was directed to do so” by Tony Italiano. (*Id.*). Gaeta assured Blackburn that the requirement to take a drug test was appropriate and that these “were the only options available.” (*Id.*). While this dialogue was ongoing, Hall proceeded to exit Gaeta’s vehicle and join Blackburn in objecting to the drug test until an order to do so came from a higher US Engineering official. (*Id.*). At this point, Blackburn called Italiano using a cell phone. (*Id.*; Tr. at 180:22-25). Gaeta then parked his company vehicle and received a call from Italiano informing him that Blackburn was willing to comply with the drug test. (*Id.*). Blackburn and Hall then entered Gaeta’s vehicle and were transported from the jobsite to Midtown Occupational Services – a drug testing facility located at 2490 W. 26th Avenue, Denver, CO. (*Id.*).

Hall, Blackburn and Gaeta made their way into the facility with Blackburn being called in first to submit to testing. (*Id.*). Hall was subsequently approached by a clinician and informed that it was his turn to be tested. (*Id.*). Hall proceeded to yell at the clinician using profanity and coarse language. (*Id.*; Tr. at 177:16-178:6; RX 4 at 2). Hall also claimed that “he did not have to pee” and that “he was a diabetic on insulin.” (*Id.*). The clinician asked Hall if he was refusing to cooperate with the test or if he needed more time. (*Id.*). The clinician explained that if Hall

needed more time, he would be given three (3) hours to sit, drink water, and inform the desk when he was ready to provide a urine sample. (*Id.*). Once again, Hall accosted the clinician with “nasty language”, claiming that “he would have to sit all day” given his medical condition. (*Id.*). At this time, Gaeta attempted to ameliorate the situation by politely telling Hall to “have some respect for this young lady” as she was “just doing her job” and that “[she] had nothing to do with our situation and [US Engineering].” (*Id.*). Hall then responded to Gaeta with “Fuck you, get out of my face.” (*Id.*; JX 1, Alvino-Hall Text Messages dated September 26, 2019 at 3). Gaeta abstained from further discussion with Hall and returned to his seat. (*Id.*).

Two (2) minutes after Hall’s confrontation with Gaeta, Hall got up from his seat and headed for the door stating that “he was leaving to smoke a cigarette.” (*Id.*; RX 4 at 2). Both Gaeta and the clinicians informed Hall that he was not permitted to leave and that “doing so would be considered an automatic fail”. (*Id.*; RX 4 at 2). Despite such explicit instructions, Hall said, “Fuck this, I’m out” and left the waiting room. (*Id.*). Gaeta followed Hall outside with Blackburn and escorted both individuals back to the jobsite. (*Id.*). During the ride back, Gaeta politely informed Hall that “he is no longer welcome back onsite and I [Gaeta] would have his tools brought down waiting for him [Hall].” (*Id.*). Hall again raised his voice and ranted – inside the vehicle – about how US Engineering was “a bunch of racist[s] and that we were pussies”. (*Id.*). Gaeta responded by telling Hall to “shut up and stop acting like a child and stop throwing a tantrum.” (*Id.*). Gaeta further explained that Hall’s actions against “the young lady in the office was very disrespectful.” (*Id.*). Hall became enraged and told Gaeta to

Shut the fuck up, I [Hall] will kick your ass in this truck right now,
I will pay someone to come take care of you, from where I’m from
we don’t play[,] New York handles business.

(*Id.*; RX 4 at 3). Hall cursed at Gaeta during the ride back to the jobsite. (RX 5, Transcript of SMART Union Trial of Salahuddin Hall at 37; RX 1) (“And when we got in the car, Yes, I cursed him the hell up.”). Hall also threatened Gaeta on the drive back to the jobsite from the drug testing location. (*Id.* at 41) (“Q: Did you threaten Jovani [Gaeta] the US Engineering foreman? A: Yes, I did.”). Specifically, Hall stated that he would “get someone younger to beat his [Gaeta’s] Tail.” (*Id.* at 41-42). Hall continued threatening Gaeta until reaching the jobsite where Hall exited the vehicle and left. (RX 1).

In a series of text messages from Hall to Alvino, Hall corroborated that US Engineering Foremen had smelled marijuana on the jobsite and demanded Hall and Blackburn to take drug tests. (JX 1 at 1-2). Hall told Alvino that US Engineering Foremen could not identify who allegedly “smelled weed” and therefore “the Forman’s [sic] were telling untruth!!!!” (*Id.* at 2). Hall also alleged that Vicky Shields – a US Engineering Safety Director – stated that Hall could get his insulin and return to take the drug test. (*Id.*). However, Shields’ testimony roundly rejected that claim. (Tr. at 185:1-186:5; *see also* RX 2, Vicky Shields Affidavit). According to Shields, Hall called her during a training class to tell her that “he [Hall] was unable to provide the necessary urine sample for his for-cause drug screen.” (Tr. at 185:8-11). Shields explained the clinic protocol to Hall, making it clear that Hall had to drink water and remain at the testing site “for three hours and keep trying.” (Tr. at 185:12-15). When an agitated Hall told Shields that “he had to get back to the jobsite to take his insulin²”, Shields reminded Hall that he could not leave the clinic – a fact reiterated by the technicians at the clinic. (Tr. at 185:19-24). Hall never stated that the insulin was necessary to provide a urine sample. (Tr. at 187:23-188:1). Moreover, Shields made it clear that “he [Hall] had the right to [go back and get his insulin from the jobsite]

² Until this point Hall had never claimed to Shields that he needed insulin or that he was a diabetic. (Tr. at 187:20-21) (“I had no knowledge that he was a diabetic or took insulin.”).

but if he left the clinic, he would fail the test.” (RX 2 at 1). Pursuant to the drug testing rules, “leaving the collection site once the process has been started is considered a refusal to test and that is a failed test.” (RX2 at 1).

C. Hall’s Termination from US Engineering

Hall was terminated on September 26, 2019 by US Engineering as a result of his failure to comply with the Substance Abuse Policy and for his threats of physical violence against Jovani Gaeta. (Tr. at 37:9-11; 178:18-25; 186:3-5). The Substance Abuse Policy requires an employee’s termination for refusing to take a probable cause drug test:

The failure of an Employee to promptly participate in testing or a search under probable cause at management’s request, or should an employee’s test results be positive and the employee refuses to seek rehabilitation or fails to complete a rehabilitation program, **that Employee shall be terminated.**

(JX 3 at 6; *see also* JX 4 at 6, Collective Bargaining Agreement) (emphasis added). There is no dispute that Hall willingly refused to take a mandatory drug test on September 26, 2019. (Tr. at 128:9-130:10; RX 5 at 21). Moreover, it is undisputed that Hall acted aggressively towards Jovani Gaeta during and after the time at the drug testing clinic. (RX 1; RX 9, Alvino-Blackburn Text Messages dated September 26, 2019; Tr. at 131:1-23) (“Q: [I]sn’t it true that you told him that -- and your exact words were, yo, man, listen, if I was ten years younger, man, I would have done something to you. But, you know, at the age I’m at right now, the way you got in my face at that clinic, I’d get somebody to tear you up. Hall: Yes, I said that.”).

D. SMART Local 9’s Investigation into Hall’s Termination

Immediately after Hall’s refusal to comply with the Substance Abuse Policy, Hall sent a series of text messages to Alvino. (JX 1). In these text messages, Hall corroborated that US Engineering Foremen had smelled marijuana on the jobsite and demanded Hall and Blackburn to

take drug tests. (*Id.*). Hall further claimed that he was “singled out” because: (1) “they don’t like that I stay to my self”; and (2) “I [Hall] heard them talking about it saying they were going to look for shit to write me up with to get my black ass back to New York.” (*Id.* at 4). Within minutes of receiving Hall’s allegations, Alvino advised Hall that he would be doing an investigation into the entire incident. (*Id.* at 5). In response, Alvino asked Hall the following questions:

What time did you go to the clinic?

How long were you there?

What time did you call Vicky?

What clinic did you go to?

Most importantly, who specifically said that they wanted to get you fired?

And especially, who made the statement to “send your black ass back to NY”?

(*Id.* at 5-6). Hall responded by saying that he “[w]ent to the clinic like 8am”, that he “texted Vicky [Shields] while I [Hall] was there and before [sic] we left and she said go get your meds and there can bring me back to the test site.” (*Id.* at 6). Hall did not respond to the other questions, stating instead that “[t]he Forman [sic] Spanish guy from sheet metal side at the job and was also drawing on cardboard boxes we hate New York. His name is fabean.” (*Id.*). Hall made the same allegation in his confidential witness affidavit but recanted during cross-examination. (Tr. at 112:22-114:6) (Hall acknowledging that his previous claims that he “knew Fabian made the sign ‘go back to New York’” was incorrect – Hall did not know who made the sign nor that it was even directed at him). Hall never asked for a grievance to be filed

regarding his termination. (Tr. at 197:19-198:2) (“He [Hall] never asked for a grievance regarding that.”).

Following the text message exchange Alvino promptly began the Union’s investigation into Hall’s termination. (Tr. at 198:10-25). Within hours, Alvino interviewed and gathered evidence from a variety of fact witnesses – Tony Italiano, Tim Hill (Foreman), Tom Marquardt (Foreman), Jovani Gaeta and Josh Blackburn. (Tr. at 198:10-200:13; RX 4). Alvino drove down to the drug testing clinic to speak with the clinic technicians. (*Id.*; RX 4). The technicians confirmed that Hall was the sole aggressor towards Gaeta and that they had informed Hall that leaving the clinic “would be an automatic fail.” (*Id.*; RX 4). In light of the allegations by Hall concerning a Foreman named “fabean”, Alvino also interviewed Fabian Gonzalez. (RX 4 at 5; Tr. at 207:2-210:10). During the interview, Gonzalez explained that nobody referred to Hall by his race. (*Id.*). Gonzalez also denied any statement about sending “Hall’s black ass” back to NY. (*Id.*). Gonzalez further noted that Hall was the only individual who ever referred to New York – specifically that Hall would constantly say that “this is how we do it in NY.” (*Id.*). When asked about the use of the term “nigger”, Gonzalez confirmed that Hall was the only person who used that word, specifically in reference to other African-American workers – Roy Atkinson and a female electrician. (*Id.*; Tr. at 207:2-210:10).

Alvino followed up with Roy Atkinson who confirmed that Hall called him a “nigger”. (*Id.*). Atkinson further clarified that “[Hall] is an embarrassment to me as a black man” and that “he [Hall] is ignorant.” (*Id.*). Atkinson explained that “[w]hat [Hall] is pulling is B.S. and he is lying. No one treats him different cause of color or race.” (*Id.*). Atkinson was so offended by Hall’s behavior that he told a Foreman that “I [Atkinson] would not work with Hall again.” (*Id.*). Alvino continued his investigation by interviewing Tom Marquardt, Tim Hill and Kevin Luna

(Journeyman from the same jobsite). (*Id.*; Tr. at 204:19). Marquardt and Luna denied that anyone ever referred to Hall by his race or color. (*Id.*). Marquardt also corroborated Atkinson's claim that Hall was the only individual who referred to people in this way – specifically the female electrician and Roy Atkinson. (*Id.*). Alvino also spoke with Unique Palmer regarding Hall's claims of discrimination. (*Id.*; Tr. at 229:2-4).

Tim Hill confirmed that he smelled marijuana on Hall and Blackburn the day of the refused drug test. (*Id.*). Hall never expressed to Alvino or the Union any basis for discrimination other than the alleged statements concerning "sending his black ass back to NY" and the cardboard writing. (JX 1). Local 9 Business Manager Dwayne Stephens also investigated Hall's claims of discrimination. (Tr. at 248:1-14; 254:17-24; JX 2, Stephens-Hall Text Messages). Stephens spoke with Jovani Gaeta, Tom Marquardt, Unique Palmer, Tony Italiano, Vicky Shields and an apprentice named Josh Peppers who Hall claimed had evidence to support his claims. (Tr. at 259:3-260:2; 260:19-262:1). After reviewing Hall's purported evidence of discrimination and holding a meeting with Hall, the Union was unable to ascertain a basis to grieve Hall's termination from US Engineering. (Tr. at 251:5-12). This decision was verbally communicated to Hall. (Tr. at 251:10-19; 254:25-255:22).

E. SMART Local 9's Efforts to Secure Work for Hall Post-Termination

As a direct and foreseeable result of Hall's refusal to take a mandatory drug test, Hall was suspended from being referred by Local 9 retroactively to September 26, 2019 and informed of his suspension via letter. (RX 3, Hall Suspension Letter dated September 27, 2019; Tr. at 205:24-206:7). The suspension was set to last until October 25, 2019 upon which Hall would have an opportunity to re-test in order to achieve eligibility for referral. (*Id.*). The Suspension Letter also informed Hall of his right to participate in an EAP (also known as a Member

Assistance Program) through Mines & Associates, P.C. (*Id.*). Following the completion of Hall's suspension on or about October 5, 2019, Alvino arranged for Hall to work for Apollo Sheet Metal at a hospital job in Centennial, CO. (Tr. at 212:1-11; 135:7-10; 136:13). After being laid off from Apollo, Hall self-solicited and obtained employment with Murphy Company. (Tr. at 76:18-22).

F. November 2019 Interaction at Murphy Company Assembly Shop

In late November 2019, Alvino went to the Murphy Company Assembly Shop to hand deliver a paycheck to Roman Naujoks ("Naujoks") arising from a complaint that Naujoks had not been compensated for hours worked on the day Naujoks was terminated from Apollo Mechanical – a previous employer. (Tr. 220:9-16; 267:10-11). Alvino wanted to hand deliver the check so Naujoks did not have to wait for his payment. (Tr. at 220:18-24). After arriving at the Murphy Shop, Alvino first went to the shop to meet with Luis Villareal ("Villareal"). (Tr. at 220:16-18; 267:8-22). Alvino and Villareal then went together to meet with Naujoks in the assembly shop area where Alvino delivered the check to Naujoks. (Tr. at 220:22-221:2) ("Roman and I had our exchange, had a conversation. I gave him the check; he accepted it, and I was done with that conversation."). Alvino and Villareal then made their way into the breakroom office area. (Tr. at 221:1-4; 267:15-16). At that point Hall followed Alvino into the office area and said "you can't come down [to the shop] and not say nothing to nobody." (Tr. at 221:6-7; 267:15-19). Alvino tried to make it clear to Hall that he wasn't there to speak with Hall, just to deliver the check to Naujoks. (Tr. at 221:7-9).

Prior to this meeting, Hall had been charged with numerous violations of the SMART International Constitution for, among other things, falsely³ claiming that a fellow member called Hall the n-word. (*See* RX 5 at 3-15) (Reading of the internal union charges against Hall into the trial record). After confronting Alvino, Hall asked “what could happen on the upcoming trial” given that internal union charges had been raised. (Tr. at 221:9-10). Alvino responded that “ultimately, it’s up to the trial committee, and those things could include suspension, fine, or even expulsion.” (Tr. at 221:10-12). Alvino did not have the chance to explain that “the ultimate determination is made by the membership [of the Union].” (Tr. at 221:14-16). After explaining how the charges could be resolved, up to and including expulsion from the Union, “[Hall] got extremely agitated, started yelling at [Alvino] that God is going to get [him]” over and over. (Tr. at 221:16-19; 267:15-19; 270:21-271:1) (“I remember Salah said -- he was like, dang, you know, God has -- you know, God is looking at you, or something like that, you know.”). After Salah threatened Alvino, a Superintendent from Murphy – Jason Anderson – came out of his office and asked Alvino and Hall to leave the office. (Tr. at 221:19-222:4; 244:4-6; 268:7-13). Alvino never stated that he could prevent Hall from working in any way shape or form. (Tr. at 220:9-223:18; 270:21-271:8). After Alvino and Salah left, there were no further interactions between them at the Murphy Shop. (Tr. at 222:7-9; 271:9-16).

Roman Naujoks was not anywhere near the office at the time the conversation between Alvino and Hall took place. (Tr. at 244:13-245:2; 268:14-24) (“[Naujoks] wasn’t in the room at all [...] Roman was on the very far side of the warehouse between two walls and several -- several steps, and I’d say -- well, I mean, he was completely not even around.”). Moreover,

³ During the internal union trial, Hall admitted that his claims were, in fact, fabricated. (RX 5 at 51) (“Q: To clarify, did John Perez say to you, to your face, Brother Hall, ever call you the N-word? A. No.”).

neither Villarreal or Alvino recalled Naujoks following them to the breakroom office. (Tr. at 223:3-7). Villarreal noted that Naujoks was “already kind of a tempered -- tempered fellow” and that Naujoks “was pretty upset” the day the check was delivered. (Tr. at 269:10-16; *see also* Tr. 222:19-23) (“[Naujoks was] not happy -- happy that he only got three and a half hours’ worth of pay, and you know, for some reason, thought he was expecting a bunch of back pay for it, and [he] was pretty combative.”).

VI. ARGUMENT

A. Legal Standard

It is well settled that a union which enjoys the status of exclusive collective-bargaining representative has an obligation to represent employees fairly, in good faith, and without discrimination against any of them on the basis of arbitrary, irrelevant, or invidious distinctions. *Vaca v. Sipes*, 386 U.S. 171 (1966); *Miranda Fuel Company, Inc.*, 140 NLRB 181 (1962). A union breaches this duty when it arbitrarily ignores a meritorious grievance or processes it in a perfunctory fashion. *Sipes*, 386 U.S. at 191, 194; *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976) (“the grievance process cannot be expected to be error free”); *Teamsters and Chauffeurs Local Union No. 729 (Penntruck Co., Inc.)*, 189 NLRB 696, 702 (1971). So long as the union exercises its discretion in good faith and with honesty of purpose, a collective-bargaining representative is endowed with a wide range of reasonableness in the performance of its duties for the unit it represents. Mere negligence, poor judgment, or ineptitude in grievance handling is insufficient to establish a breach of the duty of fair representation. *Ford Motor Company v. Huffman*, 345 U.S. 330 (1953); *Maxam Dayton, Inc.*, 142 NLRB 396, 418 (1963); *King Soopers, Inc.*, 222 NLRB 1011 (1976); *Hines v. Anchor Motor Freight*, 424 U.S. 554, 570-71 (1976) (“the burden of demonstrating breach of the duty by the Union ... involves

more than demonstrating mere errors in judgment.”). With regards to whether a labor organization’s conduct is “arbitrary”, the U.S. Supreme Court has held that “a union’s actions are arbitrary only if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a ‘wide range of reasonableness’ ... as to be irrational.” *Air Line Pilots v. O’Neill*, 499 U.S. 65 (1991).

B. SMART Local 9 Did Not Breach Its Duty of Fair Representation to Hall

Unions are not required to file grievances on behalf of bargaining unit members. Rather, the union’s discretion in determining whether or not to file a grievance is “essential to the proper functioning of the collective bargaining system.” *IBEW v. Foust*, 442 U.S. 42 (1979). Indeed, “[a] union may refuse to process a grievance or handle the grievance in a particular manner for a multitude of reasons but it may not do so without reason.” *Griffin v. Auto Workers*, 469 F.2d 181, 183 (4th Cir. 1972). The same is true where the Union does perceive a violation or believes a grievance has a very low likelihood of success. *See, e.g., General Box Co.*, 189 NLRB 269 (1971); *King v. Space Carriers*, 608 F.2d 283 (8th Cir. 1979); *Buchanan v. NLRB*, 597 F.2d 388 (4th Cir. 1979); *Williams v. Sea-Land Corp.*, 844 F.2d 17 (1st Cir. 1988).

Unions may refuse to process a grievance or process it in a particular manner, but are forbidden from refusing or failing to process it for an arbitrary or invidious reason or “without reason, merely at the whim of someone exercising union authority.” *General Truck Drivers, Local 315 (Rhodes & Jamieson, Ltd.)*, 217 NLRB 616, 617-618 (1975); *Local 417 UAW (Falcon Industries, Inc.)*, 245 NLRB 527, 534 (1980). Further, “a union is not required to carry out an investigation of the same scope and rigor as one that the Region might carry out or to follow any particular procedures in processing an employee’s grievance.” *H&M Int’l Transp., Inc.*, 2016 NLRB LEXIS 165, *167 (2016) (citing *Pacific Maritime Ass’n*, 321 NLRB 822, 823 (1996);

Asbestos Workers Local 17, 264 NLRB 735, 735-736 (1982); *Local Union No. 195, Plumbers*, 240 NLRB 504, 504 fn. 3 (1979), *enf'd* 606 F.2d 320 (5th Cir. 1979).

Unions do not breach their duty of fair representation even if certain aspects of its conduct, such as the quality of their investigation, could be subject to criticism. *Douglas Aircraft Co.*, 307 NLRB 536, 557 (1992) (union did not violate the NLRA, although it failed to speak to some witnesses and failed to speak to charging parties before withdrawing grievance); *Laborers Local 1191 (S. J. Groves & Sons)*, 292 NLRB 1022, 1024 (1989) (while union made only a “casual” request that charging party be reinstated, and erroneously directed charging party to mail grievance to the union rather than employer, which caused grievance to be time barred, no violation found as the union’s conduct was found to be mere negligence, and not arbitrary or perfunctory conduct); *Diversified Contract Services*, 292 NLRB 603, 605-606 (1989) (concluding that although union failed to discuss company’s position with charging party before meeting with company, failed to inform her of meetings, and did not conduct a full scale investigation, these factors did not amount to perfunctory representation, but mere mismanagement which is not arbitrary); *Local 64 Bartenders (HLJ Management Group)*, 278 NLRB 773 (1986) (no violation found, although union at grievance meeting failed to address an issue raised by charging party, and agreed at meeting with employer’s position that dismissal was for cause); *Rainey Security Agency*, 274 NLRB 269, 270 (1985) (concluding that delay in appointing steward, failure to maintain reasonable contact with employees and to keep them informed, constituted ineptitude or mismanagement, but not arbitrary or perfunctory representation); *Local 17 Asbestos Workers (Catalytic, Inc.)*, 264 NLRB 735, 736 (1982) (no violation found, although union representative agreed with employer’s position without any protest); *Local 3217, Communications Workers (Southern Bell Telephone)*, 243 NLRB 85, 86-87

(1979) (no violation, although charging party was never interviewed by union representatives and was never told the status of her grievance); *Local Union No. 195, Plumbers (Stone & Webster)*, 240 NLRB 504, 508 (1979) (no violation found, although ALJ found that union did not conduct an efficient investigation, and accepted employer's position); *Local 355 Teamsters (Monarch Institutional Foods)*, 229 NLRB 1319, 1320-1321 (1977) ("[the] duty of fair representation does not require that every possible option be exercised or that grievant's case be advocated in a perfect manner.").

Arbitrary or perfunctory representation is not established merely because a union might have conducted a more thorough investigation, or failed to raise particular arguments in support of a grievance. *H&M Int'l Transp., Inc.*, 2016 NLRB LEXIS 165 at *170 (2016). As the Board has observed in *Monarch Foods*, "the issue here is not whether the [union] discharged its obligations with maximum skill and adeptness, but whether, in undertaking its efforts, it dealt fairly. *Monarch Institutional Foods*, 229 NLRB at 1321; *see also Local 327 Teamsters (Kroger Co.)*, 233 NLRB 1213, 1217 (1977) (although union official did not seize upon possible inconsistencies in witnesses' testimony, "the duty of fair representation in representing employees in grievances does not require that each case be handled with the expertise of a trial lawyer").

After reviewing the record in this case, it is evident that SMART Local 9 performed a far more in-depth and timely investigation than in any of the cases cited above. Upon learning that Hall had complaints about his termination, the Union immediately took action by interviewing (and in some cases re-interviewing) witnesses and gathering relevant information relevant to Hall's allegations. The Union requested information from Hall to further investigate Hall's claims – even sometimes receiving what they requested from Hall. Local 9 also arranged for

meetings with the Union attorney to evaluate and understand Hall's claims. While there is some evidence that Alvino and Stephens may not have interviewed every single witness requested of them, that is not the legal standard set forth by the Act for a breach of the DFR.

There is no evidence in the record that the Union did anything but vigorously and repeatedly investigate Hall's claims of discrimination and wrongful termination from US Engineering. Local 9 ultimately decided against filing a grievance on Hall's behalf based on the clear language of the Substance Abuse Policy and the failure of witnesses to corroborate Hall's claims of discrimination. Clearly dissatisfied with the Union's determination, Hall decided to file a baseless claim against Local 9 asserting that the hard-reached conclusion must have been improper. Despite Hall's claims, the General Counsel has failed to provide any evidence that Local 9 did anything but reach a reasonable conclusion based on the Union's interpretation of the CBA.

C. Alvino Did Not Threaten Hall in Late November 2019

The record, the demeanor of the witnesses, the weight of the respective evidence, established facts, inherent probabilities, and reasonable inferences therefrom demonstrate that Alvino did not threaten Hall by stating that "he could prevent him from working in the State of Colorado" in November of 2019. (*See* GC 1(e), Complaint at ¶7). Strikingly, Hall's own testimony does not line up with the Complaint. (*See* Tr. at 85:19-21) ("saying he basically he could stop me for [sic] working, if I don't leave him. Basically."). At no point during the hearing did the Charging Party ever corroborate the Complaint's allegation. Roman Naujoks, the only other individual to claim any similar statement was made, testified only that Alvino was "talking about not keeping him from working, and saying, I can make it so you don't work" in the context of internal union charges. (Tr. 153:4-14). Moreover, when asked if he remembered the exact

wording of what Alvino allegedly said, Naujoks admitted he could not. (Tr. at 155:21-156:2). Without evaluating the credibility or weight to be attributed to the testimony of Hall or Naujoks, it is apparent that the General Counsel has not proven their allegation.

To the contrary, Alvino, Villareal and Anderson provided consistent testimony with a relaxed demeanor that made logical and probable sense. *See, e.g., Northway Nursing Home*, 243 NLRB 544 (1979) (establishing guidelines for determining credibility); *Gold Standard Enterprises, Inc. et al.*, 234 NLRB 618 (1978); *Northridge Knitting Mills, Inc.*, 230 NLRB 230 (1976); *Cas Walker Cash Doors, Inc.*, 249 NLRB 316 (1980). Moreover, there were no inherent contradictions in the sum total of their testimony. To the extent that they were unable to recall specific information, they qualified their testimony as opposed to embellishing or doubling-down. Accordingly, the testimony of Alvino, Villareal and Anderson should be credited.

When reviewing the testimony of Hall and Naujoks, however, the record is replete with examples where the witnesses expressed an angry, nervous or aggressive demeanor. Indeed, Hall expressed aggression throughout the hearing and admitted to threatening other individuals. (*See* Tr. at 140:17-19) (“Q: So you’re justified in threatening to throw someone out of a 16-story window if he throws something at you? Hall: After he was -- yes.”); (Tr. at 131:14-15) (“Somebody threaten me, man, I’m going to go after him.”). At different points of the hearing, Naujoks and Hall each ignored the question being asked and instead addressed Your Honor or counsel during testimony. (Tr. at 157:25-158:1) (“Naujoks: No, that -- you’re -- you’re trying to use my words against me right there.”); (Tr. at 122:4-9; 124:6-7; 139:9-17; 140:23-141:4) (“I mean, you’re trying to make it seem like I’m some thug or something, man. I been doing my thing in the Union for -- I mean, come on, man. Nobody selling drugs. I ain’t a thug.”)

With regards to consistency, Hall utterly failed to present himself as a credible witness. On multiple occasions, Hall contradicted his own testimony when asked a second time about the same version of events. For example, when asked about whether Alvino called him back on September 13, 2019, Hall initially testified in the negative:

GC: Okay. So did you end up speaking with Jon Alvino that day?

Hall: No, I don't believe so. **He never even called me back.**

GC: Okay.

Hall: I think he called me back, like, a few days later, you know? And I even called -- you know, I even called him the next day. And I -- I have all the records in my phone right here. I kept everything. So when I called him, what day, I have a whole list of the days I called him and he doesn't pick up.

(Tr. at 36:4-14) (emphasis added). On cross-examination however, Hall answered in the positive:

RC: Okay. And he -- and you attempted to call him that day, but he never called you back?

Hall: **I mean, he did -- if I'm not mistaken, he did call me back. But it wasn't till later on that day.** You know, when I was trying to talk to him -- I know he was talking to the U.S. Engineering people the whole time, because I heard them talking on the phone. And I was trying to call them. And they hung up. I couldn't get no answer. So I just felt like he was just avoiding me.

RC: So how much how much later in the day -- was it, like, at -- at night? Like a 9:00, 10:00, or was it roughly an hour later? How long was it?

Hall: I don't remember honestly. It's a year and a half.

(Tr. at 115:17-116:4) (emphasis added). Hall also repeatedly and incorrectly claimed that he was the only African-American employee in the Union or at a particular jobsite. (Tr. at 23:6-7;

41:19). When confronted with the fact that there were other African-Americans in the Union, Hall refused to acknowledge his misstatement and made disparaging remarks about a former co-worker. (Tr. at 112:1-112:21) (“I mean -- Roy who? Oh, yes, Roy. The guy that -- the black guy that thinks he’s white, basically.”).

Throughout the hearing Hall continually made claims that he was unable to corroborate. In his confidential witness statement, Hall claimed that he knew Fabian Gonzalez had made a sign that said “go back to New York.” At the hearing, however, Hall acknowledged that he did not know who made the sign nor that it was directed at him. (Tr. at 112:22-114:6). In an apparent attempt to draw a link between Alvino and John Perez, Hall claimed without any basis that “I [Hall] even know for a fact that they [Alvino and Perez] went to apprenticeship school together, and they talk and they chill together and they drink together. I know that for a fact.” (Tr. at 139:10-13; *see also* Tr. at 111:6-6) (Hall asserting that Perez and Alvino were in apprenticeship together). Later on, Alvino provided testimony that Perez was years ahead of Alvino and that they were never in the apprenticeship program together. (Tr. at 191:20-192:4).

Perhaps most damaging to Hall’s credibility is his tendency to lie under oath. Hall was brought up on internal union charges for falsely claiming that a fellow union member called him the n-word. At the internal union trial on January 14, 2020, however, Hall admitted that Perez never called him the n-word. (RX 5 at 51) (“Q: To clarify, did John Perez say to you, to your face, Brother Hall, ever call you the N-word? A. No.”). Despite Hall’s admission at the internal union trial, he had a different story to tell at the hearing in this case:

Hall: And I was on the phone at one point with him. And Perez was like, I’m going to get that nigger fired, you know? I think Mexicans feel like they can say the N-word. I mean, I -- we all shouldn’t say it. But I mean, we’re black. I feel like we can say it, but it’s not a good word. You know, that --

RC: So you're -- so you're now claiming, Mr. Hall, that not only were there text messages that said, "I'm going to get that nigger fired". But you also heard Jon Perez through the phone make that exact same statement?

Hall: No. I didn't hear it this time, but we were back at the Union meeting, he was calling me a nigger. Let's go outside, nigger; let's fight. I mean, like, you know what I mean? And everybody heard it in Union then. So not this time, but the previous time, we were in the Union meeting. And everybody heard him calling out my name and no one stopped him.

RC: Mr. Hall, weren't you brought up on charges for accusing Mr. Perez of calling you the N-word at the November 6th Union meeting?

Hall: Yes.

RC: Okay. And didn't you, at the subsequent trial, held on January 14th, recant that Mr. Perez had ever called you the N-word?

Hall: I mean, Unique said he calls him (audio interference) fired. But I mean, I didn't hear him say that. But at the back of the Union meeting, at the job, I mean, like, this dude cursed me out. I mean, I'm not the only person that heard it. His mouth is atrocious, man.

RC: Well, you -- let me just clarify something. You -- you just testified just now that you heard Mr. Perez call you the N-word.

Hall: Yes.

RC: Right. But at the trial on January 14th, which was after the fact, you testified at that trial that he never actually called you the N-word; isn't that right?

Hall: I said I didn't hear him call me that. But Unique heard it. Which Unique got up on the mic and told us the fact that he called me that. Said, I'm going to get this nigger fired. And then Unique was asked, do you think that he meant it? And Unique was like, I

don't know if he meant the N-word. But he actually said it. Meaning that he, like -- you know, he said that he was Mexican but still he could say the N-word.

RC: So your -- so your understanding today -- sitting here today -- is that you never physically or in person heard Jon Perez call you the N-word?

Hall: Until we was at the Union hall and then he -- that's when it actually came out. So when Unique said he called me that over the phone, I didn't hear him. But at the Union meeting, I heard him.

RC: So you -- I'm sorry. Please continue.

Hall: I'm just saying, at the Union meeting, I heard him.

RC: So at -- so at the November 6th Union meeting, Jon Perez specifically called you the N-word?

Hall: He was in the back calling me all type of words. And I --I

RC: I -- I -- just -- please. I think we've gotten -- we've trying to get back in this a few times. For the record, please, just yes or no. Did, at the November 6th, 2019 Union meeting. Did Jon Perez call you the N-word.

Hall: Yes. I've said it several times today.

(Tr. at 118:17-121:1). When considering Hall's credibility as a witness, it is clear that his nervous, hesitant and self-contradictory testimony should not be credited.

Concerning Naujoks' account of the November 2019 incident, the testimony between Hall and Naujoks is inconsistent. According to Hall, the conversation with Alvino occurred outside without any apparent walking or movement before the Superintendent's intervention. (Tr. at 85:6-86:7). When Naujoks testified, he recounted that the conversation happened both on the way to the breakroom office and inside the office. (Tr. at 157:11-14; 158:6-12; 159:1-12).

Notably, however, nobody else saw Naujoks anywhere near the office. (Tr. at 244:13-245:2; 268:14-24) (“[Naujoks] wasn’t in the room at all [...] Roman was on the very far side of the warehouse between two walls and several -- several steps, and I’d say -- well, I mean, he was completely not even around.”). Moreover, Naujoks did not have a firm recollection of exactly what Alvino allegedly said to Hall. (Tr. 155:21-156:15).

When considering the implausibility of Hall’s claim coupled with the lack of consistent testimony, it is much more likely that Hall misremembered (or intentionally misrepresented) Alvino’s conversation at the Murphy Assembly Shop. Given the pendency of internal union charges, which reasonably could have led to Hall’s expulsion from Local 9, it is much more likely that Alvino’s alleged statements related to the potential outcome of the union charges.

In light of the credible evidence present in the record, the General Counsel has failed to prove that Alvino made any threat to Hall in late November 29, 2019.

VII. CONCLUSION

Local 9 actively assisted and advised Hall with regards to his complaints. Business Representative Alvino and Business Manager Dwayne Stephens performed full and fair investigations concerning all allegations raised to them and responded to Hall in a timely manner. There is similarly no substantial basis to conclude that Hall was threatened in November of 2019. Of the five (5) potential witnesses to the alleged event, only two (2) recall anything close to what is alleged in the Complaint – both of whom failed to establish themselves as credible. Accordingly, the Charge must be dismissed in its entirety.

Dated: February 24, 2021

Respectfully submitted,

/s William R. Reinken

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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2021, a true and correct copy of RESPONDENT SMART SHEET METAL WORKERS LOCAL UNION 9's POST-HEARING BRIEF was served, via email, on the following:

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